

2010 WL 3273493

Only the Westlaw citation is currently available.

**This decision was reviewed by
West editorial staff and not
assigned editorial enhancements.**

United States District Court,
N.D. Illinois,
Eastern Division.

Mary VARKALIS, as Independent
Administrator of the Estate
of Michael Varkalis, Plaintiff,
v.
WERNER CO. & Lowe's Home Center
Inc., d/b/a Lowe's, Defendants.

No. 10 C 03331.

|
Aug. 18, 2010.

Attorneys and Law Firms

[Martin A. Dolan](#), Dolan Law Offices, P.C., Chicago,
IL, for Plaintiff.

[Michael Joseph Meyer](#), [Eric Franklin Long](#), [Stephen
Sloan Weiss](#), Tribler Orpett and Meyer, P.C., Chicago,
IL, for Defendants.

MEMORANDUM AND ORDER

[BLANCHE M. MANNING](#), District Judge.

*1 The defendants removed the instant lawsuit from the Circuit Court of Cook County and the plaintiff has filed a motion to remand. For the reasons stated below, the motion is granted.

I. FACTS

Defendant Werner Co. ("Werner") allegedly manufactured and designed a nine-foot fiberglass stepladder sold by Defendant Lowe's Home Centers Inc. ("Lowe's"). On or around December 21, 2008, Michael Varkalis was using the stepladder in his garage when it buckled and Michael fell and struck his head on

the garage floor. He suffered irreversible brain damage and died on August 18, 2009.

II. PROCEDURAL HISTORY

On March 15, 2010, Mary Varkalis, as independent administrator of Michael Varkalis's estate, filed a seven-count complaint in the Circuit Court of Cook County, Illinois, alleging product liability, negligence, breach of warranty, and a Survival Act claim. Specifically, the plaintiff alleged that "[w]hile Mr. Varkalis was on the ladder, it buckled, causing him to fall with great force and violence to the ground below." Comp. at ¶ 6. The complaint further alleged that "as a direct and proximate result of the ladder bucking, Michael Varkalis was severely injured, sustaining irreversible brain damage which led to his death on August 18, 2009." *Id.* at ¶ 7. The defendants, Werner and Lowe's, were properly served on March 22, 2010, and March 24, 2010, respectively.

On April 19, 2010, the defendants filed answers and affirmative defenses to the plaintiff's complaint. In addition, they filed a motion to dismiss counts III and VI on the ground that the plaintiff should have filed separate causes of action for breach of express and implied warranties given that separate recovery was available under each. In response to the motion to dismiss, on May 19, 2010, the plaintiff filed an amended complaint removing the word "express" from Counts III and VI, and proceeding only with the breach of implied warranty cause of action against each of the defendants.

On June 1, 2010, the defendants filed a request to admit facts whereby they requested that the plaintiff admit that she sought to recover from the defendants an amount in excess of \$75,000, exclusive of interests and costs. One day later, on June 2, 2010, the defendants removed the case to this court pursuant to the court's diversity jurisdiction. The plaintiff then filed the instant motion to remand on the ground that the removal was untimely.

III. ANALYSIS

A. Standard for Removal

28 U.S.C. § 1446(b) states that a notice of removal must "be filed within thirty days after the receipt by

EXHIBIT C

the defendant, through service or otherwise, of a copy of the initial pleadings setting forth the claim for relief upon which such action or proceedings is based.” 28 U.S.C. § 1446(b). Any procedural defect in a case being removed to federal court must be remanded to the state court. *Disher v. Citigroup Global Mkts., Inc.*, 487 F.Supp.2d 1009, 1015 (S.D.Ill.2007) (“where there is doubt as to whether the requirements have been satisfied, the case should be remanded.”) (internal citations omitted). Under 28 U.S.C. § 1446(b), a defendant may file a notice of removal within thirty days from receipt of an amended pleading. *See, e.g., Benson v. SI Handling Systems, Inc.*, 188 F.3d 780, 782 (7th Cir.1999) (citing 28 U.S.C. § 1446(b)). However, this general rule applies only when the original complaint is not removable. *Mortgage Elec. Registration Sys. v. Rothman*, No. 04 C 5340, 2005 WL 497794, at *5 (N.D.Ill. Feb.28, 2005).

B. Amount in Controversy

*2 The plaintiff contends that removal was improper as a matter of law because the defendants did not file the notice of removal within thirty days of service of the original complaint, which was April 21, 2010. Instead, the defendants filed their notice of removal on June 2, 2010, and maintain that it was timely regardless of the fact that the filing date was over sixty days from notice of the original complaint. According to what the court understands the defendants to be arguing, it was only when they received the amended complaint that they became aware of the possibility for removal because the amount in controversy alleged in the original complaint was not sufficient to trigger diversity jurisdiction.¹

¹ It is difficult to decipher exactly what the defendants' argument is in response to the motion to remand. While on the one hand they cite to caselaw stating that a defendant may remove within 30 days after receiving a copy of an amended pleading from which it may first be ascertained that the case is one which is removable, they also argue that they “technically *still* have not received a pleading, motion, order, or “other paper” to confirm that this case is removable” and thus, “one could argue that this case is not yet ripe for removal.” Response at

2, Dkt. # 12 (emphasis in original). They go on to argue that “[h]owever, because plaintiff has not contested the removal on the amount in controversy issue [and instead challenges only as to timeliness], the Court can reasonably assume that she will seek more than \$75,000.” *Id.* Either way, both of the defendants' arguments fail for the reasons described later in this order.

Diversity jurisdiction exists where the parties are diverse and where the amount in controversy exceeds \$75,000, not including interest and costs. *See* 28 U.S.C. § 1332(a). There is no dispute that the parties are diverse; rather, the defendants argue that the plaintiff did not adequately state an amount in controversy that would have put the defendants on notice of the possibility for removal to federal court. According to the defendants, the original and amended complaint were ambiguous because they sought only “a sum in excess of the minimal jurisdictional limits of the Law Division of the Circuit Court of Cook County,” which amounts to \$50,000.

Generally, when a complaint does not express the *ad damnum* in excess of \$75,000, the defendant may file its removal notice within thirty days from the plaintiff's admission that they are seeking more than \$75,000. *Height v. Southwest Airlines, Inc.*, No. 02 C 2854, 2002 WL 1759800, —2–3 (N.D.Ill. Jul.29, 2002); *Abdishi v. Phillip Morris, Inc.*, No. 98 C 1310, 1998 WL 311991, at *1–3 (N.D.Ill. June 4, 1998). In this case, on June 1, 2010, the defendants filed a request to admit facts to establish that the amount in controversy exceeded \$75,000, but did not wait for a response before filing the notice of removal.

A defendant must employ “a reasonable and commonsense reading” of the complaint to determine removability. *RBC Mortgage Comp. v. Couch*, 274 F.Supp.2d 965, 969 (N.D.Ill.2003) (citing *McCoy v. GMC*, 226 F.Supp.2d 939, 941 (N.D.Ill.2002)). A “defendant [is barred from] circumvent[ing] the thirty-day time limit for removal when it is obvious that a complaint states a claim for damages in excess of \$75,000, even though it is not explicitly stated in its *ad damnum* clause.” *Gallo v. Homelite Consumer Prods.*, 371 F.Supp.2d 943, 947 (N.D.Ill.2005). Absolute confirmation of the amount in controversy is not necessary where the “plaintiffs allege serious,

permanent injuries and significant medical expenses” which exceed \$75,000 on the face of the complaint. *Fields v. Jay Henges Enters.*, No. 06–323–GPM, 2006 WL 1875457, at *3 (S.D.Ill. June 30, 2006). See also *RBC Mortgage Co.*, 274 F.Supp.2d at 969 (complaints alleging “serious, permanent injuries” are “unambiguous[ly]” ripe for removal because the plaintiff almost certainly will seek more than \$75,000) (citation omitted); *McCoy*, 226 F.Supp.2d at 941 (the 30–day removal period under the first sentence of § 1446(b) is triggered when the complaint alleges “serious, permanent injuries and significant medical expenses, [and] it is obvious from the face of the complaint that the plaintiffs’ damages exceed [] the jurisdiction[al] amount”).

*3 Under this standard, the allegations in the original complaint sufficiently alleged the types of serious, permanent injuries to place the defendants on notice that the plaintiff will “almost certainly” seek more than \$75,000 such that the defendants could have removed the complaint. The defendants may not restart the tolling clock by requiring absolute certainty of the amount in controversy. *Fields*, No. 06–323–GPM, 2006 WL 1875457, at *7 (“defendants should never ... be able to toll the removal clock indefinitely through reliance on the discovery process to establish jurisdictional prerequisites with absolute certainty”). See also *Huntsman Chem. Corp. v. Whitehorse Techs.*,

No. 97 C 3842, 1997 WL 548043, at *5 (N.D.Ill. Sept.2, 1997) (citing *Mielke v. Allstate Ins. Co.*, 472 F.Supp. 851, 853 (D.C.Mich.1979) (“there is no reason to allow a defendant additional time if the presence of grounds for removal are unambiguous in light of the defendant’s knowledge and the claims made in the initial complaint.”). Because the removal was untimely, the plaintiff’s motion to remand the case to state court is granted.²

² The plaintiff alternatively argues that the defendants waived their right to remove the case based on their filing of a partial motion to dismiss in state court. Because the court concludes that the removal was untimely, it need not address this alternative basis for remand.

IV. CONCLUSION

For the reasons stated above, the motion to remand the case to the Circuit Court of Cook County [8–1] is granted. The clerk is directed to remand this matter forthwith.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3273493